

AN  
ADDRESS  
FROM  
*ROBERT GOODLIE HARPER,*   
• •  
SOUTH-CAROLINA,  
TO HIS  
CONSTITUENTS;  
CONTAINING  
HIS REASONS FOR APPROVING OF THE  
TREATY OF AMITY, COMMERCE  
AND NAVIGATION, WITH  
GREAT-BRITAIN.

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*ADDRESS, &c.*

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**T**HAT public servants, my fellow-citizens, owe those who employ them an exact account of whatever they do in discharge of their trust, has always appeared to me a truth equally clear and important. This truth, from its very nature and its objects, must be exercised according to the discretion of the agent. He is appointed for that very purpose; appointed to enquire, gain information, deliberate, and decide on public measures, according to what he may consider as the best interest of his constituents and the community. But though they give him the power of acting for them, they retain the right of judging whether he has exerted that power with prudence and fidelity; of continuing or withdrawing their confidence, as he may appear to have merited approbation or become justly liable to censure.

It is therefore the duty of every representative to give his constituents a faithful account, not only of what he has done upon every important occasion, but of the reasons and motives which have influenced his conduct, that they may be enabled to judge whether that conduct and those motives are such as they ought to approve, and to decide at a future election, whether they ought to continue or alter their choice.

Under the influence of this persuasion, fellow-citizens, I have thought it incumbent on me to address you on the subject of the treaty with Great-Britain—a subject which has produced a stronger and a more universal impression on the public mind than any that has occurred since I received your appointment; to tell you the means I have used to form a right judgment, the decision I have at length made, and the reasons on which it is founded.

And here let me declare, that if I could consider this treaty as "degrading to the National honour, dangerous to the political existence, and destructive of the Agricultural, Manufacturing, Commercial, and Shipping interests of the people of the United States."\* Could I consider it as "prostituting the dearest rights of freemen and laying them prostrate at the feet of Royalty."† Could I consider it as "a prostitution of the Sovereignty of the United States, and a wanton sacrifice of the rights of this free nation."‡ Could I consider it "insulting to the dignity, injurious to the interests, dangerous to the security, and repugnant to the Constitution of the United States."§ If I could consider it as containing "concessions incompatible with the objects of the embassy, derogatory to the honour and injurious to the interests of America, and openly and pointedly hostile to the cause of France."|| If I could consider it as "highly injurious to the commercial interests of the United States, derogatory to their National honor and Independence, and dangerous to the peace and happiness of their citizens."¶—If I could consider it as pregnant with "many evils that threaten our ruin"||—If I could consider it as "injurious to the Agriculture, Manufactures and Commerce of the United States, derogatory from their national honour, and dangerous to their welfare, peace and prosperity."\*\*—Could I consider it "as invading the constitution and legislative authority of the country; as abandoning their important and well-founded claims against the British Government; as imposing unjust and impolitic restraints on their commerce; as injurious to their agriculture; as conceding without an equivalent, important advantages to Great-Britain; as hostile and ungrateful to France; as committing our peace with that great Republic; as unequal in every respect to America, as hazarding her internal peace and prosperity; and as derogatory from her sovereignty and independence."††—Could I believe that it "in effect admits another government to controul the legislative func-

\* *Charleston Advertisement, City Gazette, July 14th, 1795.*

† *Chief Justice Rutledge's Speech, City Gazette, July 17th, 1795.*

‡ *Savannah Resolutions.*

§ *Richmond Resolutions.*

|| *Petersburg Resolutions.*

¶ *Boston Resolutions.*

|| *Portsmouth, (N. H.) Resolutions.*

\*\* *Newyork Resolutions.*

†† *Newyork Resolutions.*

tions of the Union."\*—Could I believe it "degrading to the national honour, dangerous to the public interest, and destructive to the agricultural and commercial views, of the United States"?—Could I, after sober reflection and a careful investigation of the subject, regard this act of our government in these hideous and formidable points of view; did that cool and deliberate consideration of which every important public act ought to be the result, present it to my mind in these fearful and horrid colours; I have no hesitation in declaring that I should think it my indispensable duty to lift up my voice against it in Congress, to struggle to the last against its going into operation; and if all these means should be found ineffectual, to return among you, sound the alarm, and join you in a resort to the last expedients for preventing the execution of a contract which was to place the legislative functions of the Union, under the controul of a foreign government, and end in "prostituting the dearest rights of freemen, and laying them prostrate at the feet of royalty."\*

But, fellow-citizens, let me ask you, and let me appeal to your calm dispassionate judgment for an answer, let me ask you, can these frightful events, these destructive consequences, be justly apprehended from a treaty the whole commercial part of which is to expire at the end of twelve years, and may be terminated by ourselves, within two years after the close of the present war? Can any possible operation of a treaty, admitting to be a disadvantageous, an unwise one, so soon destroy, so speedily ruin, or even in so short a period materially injure the agriculture, the manufactures, the commerce of America, which during the present universal shock in Europe, and under the depredations of all parties, have flourished and increased beyond all former example? I confess I cannot conceive it.

Let me further ask you, fellow-citizens, what reasons there are to believe that Mr. Jay would conclude, major Pinckney approve, two thirds of the Senate sanction, and the President finally ratify a treaty "degrading to the national honour, and dangerous to the political existence of the United States,"—a treaty containing "a prostitution of their sovereignty, and a wanton sacrifice of their rights,"—a treaty which "admits another government to controul the legislative functions of the Union," "prostitutes the dearest rights of freemen, and lays them prostrate at the feet of royalty?"

Mr. Jay had a reputation to support, a reputation gained by a long and active public life; would he blairt it at once? He has a family growing up around him; would he throw a gloom

\* *Philadelphia Memorial.*

\* *Trenton Resolutions.*

over all their opening prospects, and nip the bud of their prosperity by an act which must involve himself and them in one common disgrace? He held a distinguished office, from which the voice of his country might remove him; would he raise the voice of that country against him, by "profiting its sovereignty, and making a wanton sacrifice of its rights?" At the time when he agreed to this treaty, at the time when he dispatched it to the United States, at the time when, without unforeseen and accidental delays, it must have arrived and been made public, at that time he was a candidate for an high office in his own State, to which he could be raised only by the approbation of his fellow-citizens at large; would he ensure their disapprobation by betraying their dearest interests? He was opposed by a numerous and powerful party, by a popular and respectable competitor; would he furnish this opposition with irresistible arms against himself, by an act which must have drawn on him the public execration? He is said to be a candidate for the highest trust his country can bestow, a candidate in opposition to men distinguished throughout Europe as well as America, for their talents and their virtues; would he for ever blast whatever prospects he may have by agreeing to "admit another government to controul the legislative functions of his country?" No, fellow citizens! The stations which Mr. Jay has filled, the long period for which he has enjoyed a spotless reputation and possessed the confidence of his country, argue at least, a common portion of talents and integrity; and a man must be depraved and foolish to an unusual degree, who, situated as Mr. Jay was, could consent to so atrocious an act as the treaty is represented; could consent to "degrade the national honour, endanger the political existence, and destroy the agricultural, manufacturing, commercial, and shipping interests" of his country; foolish if he could consent to it without seeing its tendency, and both foolish and depraved if he saw it and yet consented.

But if Mr. Jay was corrupted by the British court, as a person in Charleston has thought proper to insinuate;\* if, as is alleged, "his dislike to the French" and "his partiality for British government and measures" be so great that "the British minister was sure of his acquiescence in every demand."† If he was of a disposition to "barter away the rights of his country, to sacrifice the interests of the western territory, and dismember it from the Union."‡ If he was inclined to make

\* *Mr. Charles Pinckney's speech.* The expression is, "to oppose him (Mr. Jay) singly, at their own court, to the talents, experience, and perhaps temptations, of their ablest statesmen." + *Ibid.*      ‡ *Ibid.*

“ an easy and ready concession to the British of every privilege they could think of inserting.”\* If he was willing to make “ an infamous and degrading surrender of the rights and character of his country,” and has “ attempted to impose ignominious shackles”† upon it: If we should believe all this of Mr. Jay upon the assertion of persons, who to say the least of them, have given no greater proofs than he has of ability or virtue, what shall we say of major Pinckney? Are we to include him in this charge of folly and wickedness? He was on the spot during the whole negotiation, and for “ many months preceding it; he had frequently communicated with the British court on the subject, he knew their jealousy, haughtiness, and obstinacy; he was consulted by Mr. Jay in every stage of the negotiation, and gave his most decided approbation of the treaty. In a letter to the Secretary of State, dated, London, Nov. 16th, 1794, he says, “ Mr. Jay communicated freely with me upon this subject during the course of the negotiation, and I have witnessed the great difficulties which have occurred in adjusting several of the articles. Although some points might have been arranged more beneficially for us, if the treaty had been dictated entirely by the United States, yet, when it is considered as a composition of differences where mutual complaints had rendered mutual concessions necessary to establish a good understanding, I think it may fairly be said, that as little has been conceded by Mr. Jay, and as much obtained for the United States, as all circumstances considered, could be expected. The business upon the whole has been concluded more beneficially for us, than I had any hope we could obtain by negotiation six months ago, and in my opinion places us in a more advantageous situation than we should have been by becoming parties to the war.” This opinion, fellow citizens, I confess had great weight with me. You all know major Pinckney, you know his modest worth, his retiring virtue, his disinterestedness, his unflinching firmness of character, his solid judgment, his conscientious attention to the discharge of every public and private duty. You have seen him act in all the various stations of civil life, and many of you have seen him bleed at your sides in defence of the rights and liberties of America. Can you conceive that he has given his sanction to an instrument by which those rights and liberties are to be laid prostrate at the feet of royalty; by which our national honour is to be degraded, our independence destroyed; our public prosperity ruined or endangered, and the legislative functions of our country subjected to the controul of a foreign government? Could he be so deceived in the nature of that in-

\* *Ibid.*† *Ibid.*

strument as to think it advantageous to America, if it were in fact subversive of our rights, liberties, constitution, and happiness?

But if Mr. Jay and major Pinckney be entitled to no confidence, if we conclude that they were imposed on or corrupted, is no regard due to the opinion of two thirds of the Senate acting on oath and in discharge of the high trust which their fellow citizens have reposed in them? These men have been selected from various parts of the Union for those qualities which entitle citizens in a free government, to public confidence.— Their interests are involved with the interests of the community. Their promotion depends on the approbation of their fellow citizens. Many of them are old and tried servants, who have grown grey in the public councils of their country, and whose wisdom and integrity have hitherto been highly valued. I know many of them personally, and I know no men of more accurate or extensive information, than are to be found among them, no men more respectable for their talents or their virtues. Why should such men betray their trust? What temptation have they to prove unfaithful to a country whose confidence they possess? They enjoyed the best means of information; they possess a good capacity of judging; they bestowed a long and careful consideration on the subject, and why should we conclude that they have decided unwisely? Have we better means of information? Have we more wisdom than they? Or have we given the business a more mature, a more attentive investigation? Have we given more proofs than they of wisdom and integrity, that we should harshly and positively pronounce them act to be "a prostitution of the dearest rights of their country at the feet of royalty?"

But if the perfidy or folly of two thirds of the Senate have been added to that of Mr. Jay and major Pinckney, can we derive no security from the integrity of Gen. Washington; from his prudence, his long-tried patriotism, his sound understanding, his cautious deliberating character, from his extensive means of information, from the long consideration which his situation has enabled him to bestow on this subject? These qualities were once thought to intitle him to public confidence; how has this title been forfeited? Has it been by the firmness and wisdom with which, a thing unexampled in other countries and other times, he suppressed a formidable insurrection without shedding one drop of blood? Has it been by the singular mixture of prudence and fortitude where with he has preferred to this young and rising country all the blessings of peace and unexampled prosperity, amidst the destructive fury of that tempest by which Europe and the West-Indies have been afflicted and

torn? Is it because we have dwelt safely under his administration, and there have been none to make us afraid? Is it because our credit has been restored, our agriculture doubled, our commerce, manufactures, and shipping increased nearly three-fold during the short period for which he has presided over our government, that we ought now to withdraw from him our confidence; now to suppose that he would ratify a treaty by which "our dearest rights would be laid prostrate at the feet of royalty?" Is it the magnanimity wherewith he was foremost in acknowledging the French Republic,\* while every power in Europe was leagued against it, or stood aloof, from which we are to conclude that he would enter into a compact "hostile and ungrateful to France?"

If mischiefs of this kind really lurked in this treaty, is it conceivable that they could escape the President's knowledge and attention? He has hitherto been considered as prudent and cautious. He had the best possible means of information on this subject. He was apprised of every step that was taken, knew the whole course of the negotiation, and understood well the substance of the treaty before it was concluded. He had the instrument in his possession from the time of its arrival in this country, early in March, until he finally ratified it some time in July. During this whole period it was under his consideration, aided by the advice of every man in the United States whom he thought it necessary to consult, furnished with all the information, from every quarter, that was requisite for enlightening and guiding his own understanding, he at length decided. And is no respect due to such a decision? I confess, fellow citizens, I cannot think so. Were I disposed to differ from it, I should still imagine that with such an authority opposed to me, I might probably be in the wrong. I should hold it necessary, before I pronounced positively that this decision was wicked or foolish, to ask myself whether I had given more evidences of wisdom, virtue and patriotism than General Washington; whether I had passed through more or severer trials; whether I had possessed more ample means of information on this subject than he, or bestowed on it a longer, a more mature examination? And finally, whether I ought, on a short investigation of my own, or a still shorter one of others, to reject this decision, supported by the talents and knowledge of two thirds of the Senate, by those qualities of Mr. Jay which have gained him such high and repeated testimonies of public confidence,

\* *This is a fact. Our government was the first to acknowledge the French Republic.*

and by the prudence, the sound discretion, the knowledge; and the tried patriotism of major Pinckney?

These considerations inclined me to think favourably of the treaty, before I had given it that attentive and thorough consideration which ought to precede every decision on important public measures. But I knew that it was my duty to bow implicitly to no authority, however weighty, but to judge and act for myself. I knew that you had sent me to form opinions of my own, not to adopt those of other persons, however respectable. I therefore resolved to spare no pains for understanding the subject, and forming a right judgment about it. For this purpose, I conversed, as far as I had opportunity, both with the friends of the treaty, and its opposers. I carefully weighed all their objections. I read attentively every thing that was written in favour of it and against it. I gained all the information in my power, and from the most respectable sources, respecting those branches of our commerce which it affects. I took the treaty itself with me on my journey, as well as the publications respecting it, which from time to time appeared. I faithfully and repeatedly studied it, recurred to it on every occasion, and carefully compared it with our other treaties, with the laws of nations, and with our own constitution.

From the time when the treaty was published, till the present moment, more than five months, this has been my chief occupation.

The result, fellow-citizens, of this examination, which I am bold to declare has been a faithful, a laborious, and an impartial one, is a firm and complete persuasion, that the treaty, hasted as we were, was proper and expedient; that, to use the words of major Pinckney, "as little has been conceded by the United States, and as much gained for them as, all circumstances considered, could be expected: That the business has been concluded more beneficially for us than there was reason to hope could be obtained by negociation, some months before; and that it places us in a more advantageous situation than we should have been in by becoming parties to the war."

The case between us and Great Britain, at the time when Mr. Jay was sent, stood thus:

We charged Great Britain with having, greatly to our detriment, retained the western posts, which she was bound by the treaty of peace to give up; with having carried away from New-York, at the evacuation of it, a great number of negroes, the property of American citizens, contrary to the express stipulations of that treaty; and with having given orders, during the present war, for the capture of a great number of our vessels, contrary to the law of nations and the rights of neutrality.

Great Britain, on her part, alleged, that we had committed the first infraction of the treaty of peace, by permitting legal impediments to the recovery of British debts, contrary to the fourth article, and that she retained the posts as a pledge for our performance of that article ; she denied that the negroes carried away from New-York were American property at the time of signing the treaty, having been made lawful prize by her army during the war. And as to the captures made on us in the present war, she pretended that they were authorized by the law of nations.

In this state of things there were but three possible courses for us to take. First, To submit quietly to the continuation and repetition of the injuries. Secondly, To pursue redress by measures of compulsion : Or thirdly, To seek it by measures of negociation.

To remain as we were, to sit down quietly under the injuries of which we complained, would have been not only dastardly and dishonourable, but unwise in the extreme ; for experience proves, that among nations as well as individuals, to submit tamely to injuries is to invite a repetition of them ; and our government must have relinquished all claim to the respect of foreigners and the confidence of its own citizens, had it suffered important parts of our territory to be withheld, and extensive depredations to be made on our property, without taking any steps to assert and vindicate its rights. To seek effectual and honourable redress then, in some mode or other, was clearly indispensable. The choice was between measures of compulsion and measures of negociation.

Compulsory measures were of four kinds : First, war—secondly, commercial restrictions—thirdly, prohibition of intercourse—and fourthly, sequestration of debts and stock in our banks and funds.

War had but few open advocates, and probably not a very great number of secret ones. The public resentment was, at one period inflamed to such a degree by the depredations of the British, that great numbers felt strongly disposed to the most hostile measures ; but when they reflected on the state of total un-preparation in which we were, without a frigate at sea, or a regiment on foot, more than was necessary for the Indian war, our harbours unfortified, our arsenals and magazines unfurnished, and five hundred thousand tons of shipping afloat with cargoes of immense value : when they reflected on the uncertain event of war, and the certain mischiefs by which it is attended ; the immense expense, the vast accumulation of debt, the increase of taxation, the destruction of property, the suspension of industry, the loss of revenue, and the total derangement of

our finances ; when they maturely weighed all these considerations, they regarded war as the greatest of evils, to be submitted to only in the last resort, only when every other expedient had been fairly tried without success.

The case, however, was different with respect to commercial restrictions. They found support in the first talents and reputation of our country, and became a favorite object with very considerable numbers. It was conceived that by laying heavy burdens on the British commerce, on their slipping in our ports and their commodities in our country, their government might be brought to a temper more amicable or more just towards us, might be compelled to make us reparation for the past, and to refrain from future injuries. But it was observed, on the other side, that these restrictions would probably widen the breach between us and Britain, instead of closing it ; would irritate rather than heal the wound ; would provoke them to further acts of injustice, not entice them to a conduct more equitable and friendly ; that the restrictions would be hurtful to ourselves as well as the British, and perhaps in an equal, or even a greater degree ; that they would probably lay on our commerce counter restrictions, whereby we should soon be engaged in a war of commercial restrictions with them, in which it might happen that they would hold out longest. In fine, it was considered, that this mode of compulsion would be attended by great and certain inconveniences, that its success would be very doubtful, and that, if unsuccessful, it could not fail to prove highly mischievous—The plan of commercial restrictions was therefore rejected.

It was next proposed to suspend all commercial intercourse with Great Britain, to receive none of her commodities in our ports, and to send her none of our own. The supporters of this plan supposed our commerce to be of such importance to Great Britain, that sooner than lose it, even for a time, she would come to our own terms. But here again it was objected, that the inconveniences of this measure were great and certain, its success doubtful ; that it would injure us extremely, as well as the British ; that they could, and in all probability would do without our commerce, quite as long as we should find it convenient to do without theirs ; and that if their government should happen to be obstinate, an event extremely probable, considering its arrogance and pride, we should be obliged at last to give up the measure, and recur to other means, after having uselessly embarrassed our trade and deranged one of its most considerable branches.

These propositions therefore of a commercial war, of restrictions and prohibitions as means of compulsion, were rejected, and, as it appears to me, upon unanswerable reasons,

The last compulsory expedient proposed was sequestration. Debts to a very great amount are known to be due in our country to the subjects of Great-Britain; and they are supposed also to possess property to a considerable extent in our banks and public funds. It was supposed that by seizing on these debts and this property, and subjecting them to sequestration, we might so embarrass the British government, as speedily to bring it to terms; or at any rate, that the sequestered effects would serve as a fund, out of which our losses, by her violent acts might be indemnified.

But it was objected, in the first place, that to infringe the security of private property would be a very unwise measure, as it respected ourselves: that it would greatly lessen the confidence reposed at present by foreigners in the good faith of our government; prevent the extension, if not put an end to the existence, of that commercial credit by which the want of capital in this young country, has hitherto been supplied, and such immense advantages given to our commerce, our agriculture, and our infant manufactures; and that in proportion as debts were less secure, all that we borrowed or bought on credit must be borrowed at an higher interest or bought at a greater price, the injuries arising from which would soon be much greater than those for which these measures were intended as a remedy.

It was urged, in the second place, that so violent a measure as the sequestration of debts and property in funds, could hardly fail to be immediately introductory of an open rupture; that we could hardly expect the British government to submit to it without reprisals; and as we have little or no property of that kind in their reach, their mode of reprisals would probably be to issue letters of marque and privateer commissions against our commerce; in which case we must either negotiate, wherefore our situation would be far more unfavourable than before, or have recourse to letters of marque and privateers on our side, and thus be immediately involved in a war, for which we were totally unprepared, and which could not fail to be productive of the greatest injury, beside being most uncertain in its event. This measure also was therefore given up; and it was resolved to make an effort for obtaining redress by means of negotiation, and, in the mean time, to prepare vigorously for the worst, in order that, if this effort should fail, we might be in a condition to adopt and pursue, with effect, such measures of compulsion as the circumstances of the case might render unavoidable. By this expedient it was conceived that we should not only gain time for preparation, which was absolutely necessary, but give ourselves the opportunity of profiting by that favourable change of circumstances in Europe, which the enthusiastic valour of the

French, their wise measures, and unheard-of exertions, joined to the divisions and folly conspicuous in the councils of their enemies, rendered extremely probable.

This system of conduct being agreed on, it being resolved to adopt measures of negotiation in the first place, and reserve measures of compulsion for the last resort, the next question was as to the mode of negotiating. It was thought that an embassy extraordinary was preferable, that being the customary mode in cases of unusual importance, and carrying with it stronger indications of a determination on the part of our government, to pursue its object with the utmost firmness and effect. Mr. Jay, at that time chief justice of the United States, was nominated by the President for this purpose, and approved by the Senate.

Objections both personal and constitutional, have been made to Mr. Jay. He has been said to be prepossessed in favour of Britain, and an avowed enemy to France. If this had been true it would surely have been a sufficient reason for rejecting him; but it is not true. I can contradict it, and do so, on my own knowledge. I have heard Mr. Jay express in public and private, and those who have been much more and much longer acquainted with him, assure me that he always has expressed the utmost pleasure in the French revolution, and the warmest wishes for its success, the greatest dislike of the former government, and sentiments of the highest esteem and regard for the nation. Mr. Jay indeed thought that the conduct of a late French minister was exceedingly improper, that he was endeavouring to gain an undue influence over the government, and involve the country in confusion: but Mr. Jefferson also thought so, as his letter on that subject to our minister at Paris fully proves, and Mr. Jefferson was never thought to hate the French, though like Mr. Jay and numberless others of our best and wisest citizens, he thought that our government ought not to be subject to the control, or insults of their minister. So Mr. Jay has given it as his opinion, as chief justice of the United States, that interest ought to be paid on British debts during the war. This is not my opinion, but I know that it is the opinion of several other judges of the supreme court, if not all, and of a great number of our soundest and most eminent lawyers. Was it ever heard before, that because a judge decided against one party and in favour of the other, he was an enemy to the former or a friend to the latter? Mr. Jay, as secretary for foreign affairs, gave it as his opinion, it is said, that we had made infractions of the treaty as well as Great-Britain. The fact is notoriously so. We agreed not to impede the recovery of just debts, and we did impede it in various instances. Such are the proofs of Mr. Jay's partiality to France and partiality to Great-Britain. But if he

were ever so partial to one and inimical to the other, what has that to do with the treaty? Must it stand or fall by its own merits or demerits, or by those of the negotiator?

It is also said that it was contrary to the constitution to bestow this appointment on Mr. Jay, while chief justice of the United States. If the President in this instance wilfully infringed the constitution, let those who think so impeach him. If I can be convinced of it, I, for one, will not only vote for the impeachment, but support it with all my might. For, considering that the constitution is the charter of our liberties, and the guarantee of them to our posterity, I think the wilful infringement of it an offence which no consideration should induce us to pardon or overlook. If it were only an error in his judgment, and he too is liable to error, though perhaps not more so than those who accuse him, the error should have been corrected, and all legal and proper means used for that purpose. But in the mean time, what has the merit or demerit of the treaty to do with the error or the offence? The question is, whether the treaty be a proper, a beneficial one; not whether the minister who negotiated it, were constitutionally appointed. If the minister were weak, ignorant or wicked, that would be a good reason for suspecting the treaty to be a bad one; but can his talents for negotiation, or his integrity, be lessened or increased by the constitutionality or unconstitutionality of his appointment? But how does it appear that Mr. Jay's appointment was unconstitutional? The constitution says, that the legislative, executive, and judicial powers shall be distinct and separate. But is negotiating a treaty a legislative or an executive act? So far from it, that it is not, in the eye of the law or the constitution, an act of any kind. To make a treaty is partly an executive, partly a legislative act; but the minister does not make it any more than a lawyer makes a will or a deed which he is employed to draw up. It derives its legal existence and efficacy not from the act of the minister who negotiates and signs it, but from that of the President and Senate, who ratify it. They make the treaty, and the negotiator is only an instrument in their hands for that purpose; as much an instrument as the clerk who is employed to engross, or the messenger who carries it. But the same persons, it is said, cannot perform two different functions at once. How does this appear? The constitution says no such thing. It will seldom be possible, and more seldom will it be expedient, for the same person to sustain two functions at one time; but the constitution does not forbid it, when possible and expedient; and of this possibility and expediency, the President and Senate, in whom rests the power of appointment, are to judge. It is further contended,

that a judge will have an improper bias, in favour of a treaty which he has negotiated, which he has been concerned in making; and should therefore never be employed for that purpose. It would be just as wise to say, that no person who had negotiated a treaty, who had been a member of Congress, or of any State Legislature, could ever after be made a judge; because in all those cases he would be called upon to expound and enforce laws which he had been concerned in making. At this rate, before the President can place a man of the most distinguished talents on the federal bench, he must enquire, whether the candidate has ever been thought worthy of a seat in the Legislature of his own state, and if he has, reject him. He will probably find but few who possess this necessary qualification; of which I am sure that not one of the present judges can boast. They have all been members of their state legislatures, and most of them members of Congress. One of them was taken from the Senate to be made a judge. I would ask whether it would be unconstitutional for the President to call for the advice of the judges about some executive act, the ratification of a treaty for instance? And yet a judge who advises a treaty may have as strong a bias in favour of it, as one who negotiates it; and one case is just as much a blending of the executive and judicial departments as the other. Would it be unconstitutional in the President if he were going on a military expedition during the recess of Congress, to make a member of either house his aide-de-camp? Yet this would be employing a member of the legislative body in functions appertaining to the executive department.

For these reasons, fellow citizens, it appeared to me that Mr. Jay's appointment could not be justly considered as unconstitutional, or improper; and that if it were both the one and the other, still this would not affect the merits of the treaty; from an attentive and impartial examination of which, a correct judgment can alone be formed.

Among the numerous objections which have been made to the treaty itself, none appear to have produced a stronger impression on the public mind, than its giving up the claim for negroes carried away at the end of the war, and its making no provision against the impressing of American seamen into the British naval service.

The last of these objections seems to me to arise from an oversight; or from very great inattention to the instrument. The nineteenth article provides, "that for the security of the respective subjects and citizens of the contracting parties, and to prevent their suffering injuries by the men of war or privateers, of either party, all commanders of ships of war, privaizers, and

17

all others the said subjects and citizens, shall forbear doing any damage to those of the other party, or committing any outrage against them." Does not this amount to a complete prohibition against the impressing of American seamen? For what greater injury or outrage can be done to a man than to seize him by force, and carry him to serve on board a ship of war? Beside even this was unnecessary; for to impress our seamen is an illegal act, expressly contrary to the law of nations; as much so as to take our ships, invade our territory, or burn our towns; and it would have been just as reasonable to require a stipulation against these or any other acts of hostility. It would be like insisting on a neighbour to give bond and security that he would not rob us or burn our houses. It will often be difficult to distinguish American from British seamen, and mistakes no doubt will sometimes be committed. The British claim a right to impress their own seamen wherever they find them; there are great numbers of them on board of our ships, where they get better wages than in their own. In taking them, American citizens will often be taken by mistake, and sometimes by design; for we can never be perfectly guarded against insolence and violence; but this would also happen if a thousand treaties were made. The treaty on some occasions would, through mistake or design, be disregarded, as the law of nations now is. Our government must pass a law to furnish its citizens with proper certificates, and if those who have them are impressed, it must interfere efficaciously in their behalf, and get them released.

On the subject of the negroes, there has been much misconception. The number taken away, as far as it can be ascertained, does not exceed three thousand, of these one thousand were free, or belonged to persons who went off with the British. Two thousand consequently is the whole number for which payment could be demanded. A very great number died, and a still greater perhaps was sent off to the West-Indies, during the war; but the treaty of peace does not comprehend these. Its words are "his Britannic majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes, or other property of the American inhabitants, withdraw all his armies," &c. This can relate only to negroes, to be carried away at the evacuation, by British authority, and the number of these does not exceed two thousand. Stating these two thousand at two hundred dollars each, the whole amount is four hundred thousand dollars. Is this a sum for two countries to quarrel about? A war of three months would cost five times as much. The British government absolutely refused to give up the point. They were pressed again and again, and still adhered to it with inflexible obstinacy. They contended,

that we had no right to payment for these negroes ; that the treaty of peace meant only such negroes as were American property at the time of the evacuation : and that they having been taken in war, had by the laws of war become booty and were no longer American property, any more than horses, cattle, or any thing else which had been taken. Whether they were in the right, or we, is not easy or necessary to decide. They insisted on it, and the question was, whether we would give it up, or break off the negotiation, and come to an open quarrel with them. Would it have been wise to do so ? I think not. I think it was much better to give up the four hundred thousand dollars ; and for our government to pay it, if necessary, to the sufferers. To act otherwise would, in my opinion, have been like two men going to law about the value of a cow, and expending an hundred pounds a-piece in the dispute. Nations as well as individuals, must sometimes make concessions if they wish to live in peace ; and for each party to insist obstinately on all that he thinks himself intitled to, would prevent the possibility of terminating differences in an amicable manner.

Another objection of great force against the treaty is, that it is hostile towards France.

But wherein does this hostility consist ? All the rights of France under her treaties with us are expressly saved : for in the twenty-fifth article, it is stipulated that "nothing in this treaty contained shall, however, be construed or operate, contrary to former and existing public treaties with other sovereigns or states." These are the words. How then can any of the rights of France be infringed ? The treaty, it is said, will prove disadvantageous to the interests of France. But, fellow-citizens, what does this amount to ? It amounts, as I think, to saying, that the government of America is not to be guided by the interests of its own citizens, but by those of its allies. We have nothing to do with the interests of France, or any other power. We must take care not to infringe their rights, and leave the care of their interests to themselves. It is the interest of France to make us quarrel with Britain, and of Britain to make us quarrel with France : because both wish to render us subservient and useful to themselves, and to make their commerce flourish at our expense. It is our interest to be in peace with them both, and to prevent either from gaining influence in our councils ; which we may be assured they will direct, as far as they can direct them, for their own interest and not for ours. What becomes of the independence of our country, if we can make no treaty without first inquiring whether France or any other power, will be injured or benefited by it ? This would make us her subjects, not her allies. Has she consulted us in

any of the treaties which she has made? It would be very much to our interest for her to remain at war with all Europe, because she and her enemies are obliged to purchase our provisions at an enormous price, and our neutrality gives us immense advantages in the carrying trade; yet it would be unreasonable in us to expect, and very foolish in her to agree, that the war should continue longer than necessary, because it conduces to our advantage.

It is contended that this treaty puts our commerce with Britain on a footing very injurious to France, and is therefore an infringement of her rights under the laws of neutrality. This would be a solid objection, if it were true; but is it true? I apprehend not. The treaty, it is said, prevents us from exporting to France the commodities of her islands. But it was the twelfth article from which this effect was apprehended, and the twelfth article was rejected by the Senate. Beside, the twelfth article did not say that we should not carry the produce of the islands to France. It only said that we should not bring them into our own country, and then re-export them to any country; but we might still, even if the twelfth article had been ratified, carry them from the islands directly to France, whenever the French themselves would allow us the privilege. It is further said, that the treaty, by the eighteenth article, gives us the right of carrying provisions to France during the war, and allows the British to capture our vessels if they make the attempt. This, if true, would be a sufficient objection to over-set the treaty; but it is not true: The words of the eighteenth article are these; "And whereas the difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband, may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed, that whenever any such articles so becoming contraband according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified." Every body knows that there are cases in which provisions may become contraband by the law of nations. If there be no such cases, then this clause has no effect; for it applies to cases where such articles become contraband according to the existing laws of nations, and to them only. If there be such cases, then the article provides that the provisions instead of being confiscated, as they would be by the law of nations, shall be paid for, with freight, charges, and a mercantile profit. This stipulation of consequence, is greatly in our favour; since in many cases it saves our provisions from confiscation, to which they would otherwise be liable. It also operates favourably to

France ; for our merchants will be more apt to send provisions there, when all the risk they run is that of being carried into England and paid for, than if they were in danger of being not only carried in, but confiscated. Yet this article is represented as hostile to France, and has been called "an attempt to bring even provisions under the head of contraband."\*

With as little justice has the treaty been charged with defining and punishing piracy. It does no such thing. It agrees in the twenty-first article, that if any of our citizens privateer against the British under foreign commissions, and are taken, the British may punish them as pirates. That is, that if our citizens choose to put themselves out of the protection of our government by committing hostilities against a nation with which we are at peace, we will not countenance them ; we will not protect them ; we will not quarrel with that nation on their account. The treaty does not say that we will punish them as pirates, but that the British may, if they catch them. And the British make the same agreement on their part. Is not this perfectly reasonable ? Ought we to engage in the quarrel of every person among us whom avarice or idleness may induce to turn privateer against nations with whom we are at peace ? I conceive not. When our citizens take commissioners from other powers for privateering, they must look to those powers for protection, and not expect that we should be drawn in to endless quarrels for the irregularity of their conduct.

This clause about piracy has been represented as extending to persons who take commissions in the land and naval service of powers at war ; but this is a mistake. It is confined entirely to privateers and letters of marque. As to other commissions it is agreed, that our citizens shall not accept them against the British nor the British against us ; and that the laws against such offences shall be punctually executed. The treaty speaks of no new laws on this subject ; it expresses only that those already made or which may be made hereafter, shall be enforced.

Surely such laws as the legislature has thought proper to make ought to be enforced. If they are unwise or improper, the legislature can repeal them ; and whether there shall be any additional ones, depends on its own wisdom, and future consideration. Surely those who have the strongest impression of our obligations to our allies, will not contend that we ought, thro' complaisance to them, to suspend the execution of our own laws, or forbear to make such others, from time to time, as we may judge expedient for the safety and prosperity of our country. If we are not only to ask a foreign power what treaties we shall

\* *Charleston resolutions, Sec. 19.*

make, but also what laws we shall make, and what we shall execute, we must give up, in my opinion, all claim to the character of an independent nation.

In all our other treaties, in that with France, article 21, in that with Holland, article 19, in that with Sweden, article 23, and in that with Prussia, article 20, it is expressly stipulated, that if, while the two parties are at peace, the citizens or subjects of one take commissions or lettres of marque from any foreign power to privateer against the citizens or subjects of the other, they shall be liable to be punished as pirates. In every treaty which we have made this has been a part. If it were unwise or improper, why has it been done on every other occasion; or why has it never been complained of? If wise and proper, why should it not be done now? Why should we refuse to do that in a commercial treaty with Great-Britain, which we have already done in commercial treaties with the kings of Sweden and Prussia, with whom we have little or no intercourse, and whose commerce with us is of very little importance?

Another ground of strong objection to the treaty, is, that it did not obtain an immediate, or at any rate an early, surrender of the Western Posts.\* The true state of that business seems to me to be thus: Great-Britain is in possession of the Posts, and we, to whom they belong, wish to get them. Great-Britain promises to give them up in eighteen months; but absolutely refuses to do it sooner. The question then is, will we wait this eighteen months, or attempt by force to get them sooner? If we do it sooner, it must be by force; for though very hard pressed on that subject, and repeatedly pressed, as I am authorized to declare, they positively and obstinately refused. Let those who might be inclined to use force, recollect that such an attempt would be the beginning of a war; and that is a short war which lasts only eighteen months. Let them recollect how much trouble the Indians have given us in that quarter; what a vast expense; and how many years it has cost us to bring them to reason; and how much more unmanageable we should have found the British and Indians together. The British, it is said, have encouraged the Indians in the war. That may be. I believe it is so; but there is a vast difference between secret encouragement and open direct assistance. It has been said that our Envoy ought to have broken off the treaty, unless the posts were immediately delivered. But would that have brought us any nearer getting them? Suppose the treaty had been broken off, what should we have done next? We must have let the British keep the posts, fought to recover them, or begun a new treaty.

\* *Charleston Resolutions, Sect. 4.*

Would this new treaty have been likely to succeed better than the other? I think not. They who say the negotiation ought to have been broken off, seem to me to forget that it was we, not the British, who wished to treat. They were in possession of all they wanted, except their old Debts, and they held the posts as a security for them. We wished to get possession of our rights unjustly withheld from us; and we had the choice of negotiation or compulsion, for that purpose. Which was best? negotiation in my opinion; because compulsion is uncertain, tedious, and very expensive.

But it is said, that we have only the promise of the British to give up the posts on the first of June, 1796, and they may break their word. So they may: and if they had promised to surrender them in six months, or three, or in a fortnight, still we should only have their word: and that is all we can have in agreements with nations or individuals. Suppose we should go to war with them, and get the advantage; it is very uncertain whether we should be able to take the posts, for that would require a very great force: All we could do would be to compel the British to make peace, and agree to give them up by such a day. Here we should have no more than their promise; and that we have got without a war. It is their interest, however, to keep this promise; for our government, in consideration of it, has agreed to pay their subjects the damages which they have sustained by the legal impediment to the recovery of their debts. The posts are to be delivered before this payment becomes due; and if they should not be delivered, we shall be at liberty to withhold the payment. This promise, beside, is now soon to be performed. The posts are to be delivered the first of next June, about six months, and we understand the British are now making preparations for the surrender. Had we not better wait this six months, and see whether they will perform their promise, than quarrel about the delay?

Suppose, fellow citizens, one of you should come to me as a lawyer, and tell me that a person was in possession of a tract of your land, lived on it, and had a crop growing: that provided you would leave some old accounts to arbitration and agree to pay what might be given against you, he was willing to acknowledge your right, and give from under his hand to move off in the fall, as soon as he could get in his crop, and provide a place for his family; but absolutely refused to go sooner. Should I advise you to go to law under these circumstances, or wait till the fall, and agree to the arbitration? Surely if I advised the former step, if I advised a law suit, I should be a very bad friend, a very unwise or a very dishonest lawyer. You will bear testimony for me, I think, that I never gave such advice. But how much more mischievous would it be in the affairs of a nation;

where millions of expence, and thousands of lives would probably pay the forfeit !

The treaty has been charged with permitting, by the first article, "the unconditional return to our country of all persons who were proscribed during the late war." \* I confess I cannot see how this permission is to be found in the first article. It says, "there shall be a firm, inviolable, and universal peace, and a true and sincere friendship, between his Britannic Majesty, and the United States, and between their respective countries, territories, cities, towns, and people of every degree, without exception of persons or places." If this permits the unconditional return of banished persons, how comes it to pass that they did not return under the treaty of peace, between us and G. Britain, which contains precisely such a stipulation. In the 7th article of the treaty of peace, it is asserted that "there shall be a firm and perpetual peace between his Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other." The persons who adhered to the British, the royalists and tories, were all British subjects, and yet none of them had a right to return under this stipulation in the treaty of peace. How then can they have it under a similar stipulation in the treaty of commerce? The truth is, as it strikes me, that peace and residence, are things entirely distinct. A nation may be at peace with another, and yet preclude from its territories, or from all but certain places, all the individuals of that other; as the Chinese and Japanese constantly do; as well as the English and Dutch with respect to their East-India possessions, and the Spaniards with respect to their dominions in South America. Where two nations intend not only to be at peace, but to give the people of each other mutually the right of residence, for commerce or any other purpose, there is always an express stipulation to that effect. Suppose we should pass a law making a certain offence punishable by perpetual banishment, and a subject of G. Britain should come here, commit the offence, be convicted of it, and banished? Would he have a right under this article, to return, notwithstanding his banishment? I conceive not. Suppose a British subject should be transported to Botany Bay, for 14 years, should he escape from thence immediately, and come to America? By residing here 5 years, concealing his circumstances, and conducting himself well, he might become an American citizen. Could he, under this article, return and reside in England, before the 14 years had expired? I conceive not. Nations, as well as private persons, may exclude from among them a great many with whom they

\* *Charleston Resolutions, Sect. 3.*

are willing to be at peace. Because I agree to live peaceable with my neighbors, are they at liberty to come and live in my house?

It has been charged against the treaty, that it "establishes by the 1<sup>st</sup> article, a British colony within our limits with peculiar privileges."\* One would suppose from this expression, that the persons whom the treaty permits to remain within our limits without becoming American citizens, were to be free from our laws and jurisdiction, and subject to those of G. Britain; for that is the import of the word "colony." But is this the case? Certainly not. These persons, as it appears to me, are to remain within our territory, as British subjects, precisely in the same manner as hundreds of British subjects and subjects of every other country, remain in other parts of our territory at Charleston, Philadelphia, N. York, and elsewhere; subject to our laws in every respect, liable to taxes, military duty, and all the other burdens of citizens, but deprived of the privileges. The number of these people is inconsiderable; not more than 4000 at all the posts; some affirm not more than 3000. By the surrender of the posts to the U.S. the inhabitants would not only have become citizens, but would have lost the character of British subjects, which numbers of them may wish to retain. Sooner than relinquish this character, many of them, perhaps all, would probably have removed before the evacuation, and carried with them into Canada, their capital, their industry, their knowledge of Indian trade and their Indian connections. Thus by the surrender of the posts we should have obtained some spots of earth of little value, while the Indian trade, the great object of our wishes, would have been transferred with the inhabitants, to the British dominions. To prevent this, the treaty wisely provides, that these people tho' they continue in our country, may, if they please, remain British subjects; a provision without which they would by the act of continuing have become American citizens. By this mean many of them may be induced to remain. Their industry will be for us; the property they acquire, the improvements they make, the commerce they establish for us; their families will grow up citizens; and it is highly probable, that they themselves will soon wish to become so. Those who accuse the treaty of having admitted these people to the rights of citizenship, seem to have forgotten, that if the posts had been given up without saying a word about them, they would have become citizens. And if they had not, what should we have done with them? Drive them away? This would not be conformable to our policy in

\* *Charleston Resolutions, Sect. 4.*

other cases, which has been to intice people into our country, not expel them from it. They are disposed, it is said, to do us mischief, and have joined the Indians against us. Some of them may have done so; but there is no proof that the number was considerable. And if it were what should we have gained by driving them off? Would their hostile disposition be diminished by being expelled from their homes, and seizing their property? Or would it lessen their power to hurt us? No: for they need only move to the other side of a river, and then they would be in the British dominions, free to execute their malice and resentment on every favorable occasion; whereas, while they stay among us, we have their families and their property, as pledges for their good conduct. But extraordinary privileges, it is said, are granted to these people. What are these privileges? To keep their property if they stay, and sell it if they go. These privileges do not seem to have any thing very extraordinary in them. To let them stay, and yet take their property from them, would be somewhat extraordinary; and as to allowing them to sell it if they go away, that is always permitted even to enemies, on the breaking out of a war.

It has been alleged that these people hold vast quantities of land, which by the treaty they are allowed to retain. They can hold no lands but what were held at the treaty of peace, either by them or those under whom they claim. The British government has made no grants since; and if it had they would be invalid, being made within what that government itself acknowledged to be our territory. The quantities of land held there at the treaty of peace, are not, as far as I have been able to learn, by any means considerable: and be it much or little, the persons who held it, had a right to retain it by the treaty of peace, in common with all other persons whose lands lay within the limits then established.

A further accusation against the treaty is, that it "erects a tribunal new and unknown to our constitution; inasmuch as it transfers the right of deciding on the claims of British creditors from the courts and juries of America to commissioners; a majority of whom may be British subjects and by their decisions, tax the revenue of these states at pleasure." \* This objection is made to the sixth article.

But is this the sense of the article? The case appears to me to stand thus. Our citizens owed considerable debts

\* *Charleston resolutions, Sec. 7.*

to British subjects, contracted before the peace. The recovery of these debts had, in many instances, been delayed since the peace, by legal impediments; such as instalment laws, valuation acts, and tender laws. During these delays many of the debtors became insolvent, wholly or in part, so that even after the impediments were removed, the creditors were not able to obtain payment "in the ordinary course of justice." In these cases our government undertakes to indemnify them for the loss, provided it should appear not to have arisen from their own "delay, negligence, or wilful omission," or from "such other causes as would have equally operated to produce such loss, if the legal impediment had not existed." The claim must still be decided on by our own courts; the creditor must sue there; the debtor may make any defence, may shew that the debt never was due, or has been paid, or that a composition has been accepted, judgment must be obtained, and execution issued, and the money recovered from the debtor if he be able to pay. Till all this is done, it cannot appear that the debt cannot be obtained "in the ordinary course of judicial proceedings." When this appears, the business of the courts ends, because they have done all that was in their power. The government then undertakes to be answerable, and the creditor goes before the commissioners. The insolvency being ascertained by these proceedings, the commissioners inquire whether it arose from the "lawful impediments aforesaid," or has been occasioned by the delay, negligence, or wilful omission of the creditor, or any other cause which would have produced it, had no legal impediment existed? In the latter case he can recover nothing. If the insolvency took place during the war, before the legal impediments commenced, or after they ceased, he can recover nothing. If while the legal impediment existed, he neglected to go as far towards securing his debt as it would have permitted, he can recover nothing. The legal impediment, for instance, might hinder him from selling the property of his debtor, without hindering him from obtaining a judgment and execution so as to bind that property: if he neglected to do so he can recover nothing. It might hinder him from obtaining judgment, but not from compelling security; if he did not compel it, he can recover nothing. Hence it appears, that the United States will be liable in comparatively few cases; and that the business of the commissioners is, not to decide upon the debt, to liquidate or enforce it, but

where it has been lost, to pronounce whether the loss has proceeded from a legal impediment created by our government, or from the neglect of the creditor himself.

Fault has been found with the method of appointing commissioners. Our government is to appoint two, the British government two, and those four are to agree on a fifth. If they cannot agree unanimously, our two are to name one person, and those of the British another; and from these two persons, so named, one is to be drawn by lot, and to be the fifth commissioner. This fifth commissioner, and one of those chosen by each party must always be present in order to make a board. Could there be a fairer way of appointing these arbitrators? I think not. A majority it is true, may be British subjects, and British creditors; but it may likewise happen that the majority will be American citizens and American debtors. The chance is precisely as great for one as for the other. The probability is, that the choice will be an impartial one on both sides, and will fall on men of talents and integrity, as little connected as possible, with either party.

"The seventh article," it is said, "makes restitution for the extensive spoliations lately committed on our commerce, remote, expensive, and uncertain." \* It seems to me, ~~as~~ as much so, and no more, as the restitution which we undertake to make British creditors for the losses occasioned by legal impediments to the recovery of their debts. Nor do I see how it could be more speedy in either case. They undertake to pay us for irregular captures, where indemnification cannot be obtained in the ordinary course of judicial proceedings we must sue in their courts as they must in ours, before it can appear whether indemnification can be obtained in that mode. Thus far it is perfectly equal on both sides; but we have a very great advantage in this respect, that our government indemnifies the British creditors against the insolvency of the debtor only, and that in those cases alone where the loss has arisen in consequence of some legal impediment; whereas the British government indemnifies our merchants not only against the insolvency of the captors, in all cases where they themselves have been guilty of no neglect, but also against the orders of the government, and the decisions of their courts, where those orders and decisions are contrary to "justice, equity, and the laws of nations" those being the land marks.

\* *Charleston resolutions, Sect. 8.*

established by the treaty to guide the decisions of the commissioners.

There have been a great variety of other objections made to this instrument, which the compass of this address, already, I fear, too long, does not permit me to consider. I have, however, carefully examined them all, and think them all capable of a satisfactory answer. Those which I have stated appear to me to be the most material. Perhaps they may have more weight than I have imagined; but while I think them void of foundation, I cannot allow them to influence my conduct; for which I have, and ought to have, no other guide than my own understanding.

These objections are against the expediency of the treaty, but it is also objected to as unconstitutional. The President and Senate, it is said, have exerted powers which belong to the whole legislature, and in so doing have violated the constitution. But, fellow citizens, the constitution is the supreme law of the land, and any treaty, or other act of the government, which is contrary to it must be a nullity. The judges of the supreme and inferior courts, whose office it is to expound and enforce the laws, must disregard such an act. They are to judge whether it is law or not; in other words, whether it is contrary to the constitution. In one instance, they declared a law passed by congress to be void, because they thought it against the constitution; and no doubt if this treaty should appear so to them, they will treat it in the same manner.

But I cannot conceive that the treaty is contrary to the constitution. The legislative power, and the treaty-making power are distinct in their nature, different in their objects, and placed in different hands. The legislative power depends for its exertion, on the will of our own government alone: the treaty-making power requires the consent of another government. The legislative power applies to objects internal, to acts within our own territory, to relations existing between our citizens themselves, or between them and strangers who come among us. The treaty-making power on the contrary applies to objects external, to acts which may be done in foreign countries as well as our own; to the relations between us as a nation, and other nations. The legislative power regulates the conduct of one individual towards another individual; the treaty-making power, that of one people towards another people. The first of these

powers, the legislative, is by our constitution vested in congress; by which I understand the two houses, the senate and representatives; the second, the treaty-making power, is given to the President, under the control of the Senate.

When therefore the constitution says in one place, that congress, meaning the two houses, shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes ;" and in another that the President " shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur" how is it to be understood? The power to make treaties is unlimitted and universal; and we know very well that four fifths of the treaties which have been made for the last hundred years, either relate wholly to commerce, or contain commercial regulations. Out of six treaties which the old congress made, four are commercial treaties. If we say that the President and Senate can make no treaty to contain a regulation of commerce with a foreign nation, we shall render the power to make treaties, which the constitution gives them, almost a dead letter. Yet the same constitution says, that congress " shall have power to regulate commerce with foreign nations." The difficulty at once disappears by recurring to the difference between the legislative and treaty-making powers, in their nature and objects. Congress possesses the legislative power: it being declared by the 1st section of the 1st article of the constitution, that "all legislative powers therein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives." The regulations of commerce therefore which congress is authorized to make, are *legislative regulations*: regulations which depend solely on the will and act of our own government, without requiring the consent and concurrence of another government; regulations which are to operate in our own country alone. But those regulations of commerce which are not legislative, which require the concurrence of other governments, which are to operate in foreign countries, cannot be made by the legislature; they can be effected only by treaty; and the power of making treaties is given by the constitution, not to congress, not to the legislature, but to the President and Senate.

When therefore the constitution says in one place that "all legislative powers shall be vested in congress" and

afterwards enumerates among these powers that of "regulating commerce," it explicitly declares, that the regulations of commerce which congress is to make, are legislative regulations and no other: and when it goes on to give the treaty-making power to the President and Senate, it declares no less explicitly, that those branches of the government shall have power to make all those commercial regulations, which requiring the consent of other governments, lie beyond the reach of our own laws, and can be effected only by treaty.

This construction is supported by the authority of a gentleman whom every American must always be proud to quote. Mr. Madison, supporting the constitution in the convention of Virginia, and refuting some objections which had been made to the manner of placing the treaty-making power, laid down the distinction between that and the legislative power, and observed, "that the exercise of the power must be consistent with the object of the delegation." That is, that the treaty-making power must apply only to such acts, such regulations, as are the proper objects of treaties; and the legislative power to such as are the proper object of laws. To raise money for instance, is the object of a law, but to agree with a foreign nation for the payment of a sum of money, is the object of a treaty: though the President and Senate therefore may contract with another power by treaty, to pay it a sum of money, yet they cannot lay a tax by treaty to raise the money. That must be done by congress; by the legislative power.

This distinction has been adopted and acted upon by our government in a variety of instances which have never been complained of. Treaties have been made with most, if not all, of the Indian nations on our borders; and one has lately been concluded with all the tribes northwest of the Ohio. All these treaties contain regulations respecting our commerce with the different tribes. This has never been considered as unconstitutional; has never been objected to; and yet the constitution says that congress, among the legislative powers that are vested in it, shall have that of "regulating commerce with the Indian tribes." The meaning evidently is, and has always been so understood, that congress shall have power to make all the *legislative regulations* that may be necessary in our commerce with the Indians; all the regulations which, depending solely on the act of our own government, might be effected by our own laws; while

those which required the concurrence of the Indians themselves, considered as independent nations, and could therefore be accomplished only by treaty, were left, under the treaty-making power, to the President and Senate.

This has also been the constant sense of the American people, and of the United States, in Congress assembled under the old confederation. The old Congress had no power to make any legislative regulations respecting commerce of any kind. All this the States reserved to themselves. The first section of the ninth article of confederation and perpetual union, enumerates the powers granted to the United States in Congress assembled, and among them is that of "entering into treaties and alliances; provided that no *treaty of commerce* shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts on foreigners as their own people are subject to." Here the people of the United States, by their representatives in the state legislatures, declare in the most explicit manner, that under the power of "entering into treaties and alliances" treaties of *commerce* may be made; and also that those treaties, unless it had been expressly guarded against by a proviso, might "restrain the legislative powers of the respective states," in regulating their own commercial affairs. According to this principle the old Congress, under the power of "entering into treaties and alliances" exactly the same power which is given to the President and Senate by our present constitution, went on to make commercial treaties with all the powers of Europe that could be prevailed on to enter into them; with France, Holland, Sweden and Prussia; and made repeated overtures for the same purpose, to Great-Britain. Had the states considered these commercial treaties entered into by the old Congress, as an infringement of their rights, as an undue extension of the power of "entering into treaties and alliances" which had been granted to the confederation, would they not have complained? Would they not have remonstrated? They were sufficiently jealous of the confederation; sufficiently niggardly in the powers with which they agreed to invest it. Would they have quietly submitted to see those powers illegally, improperly enlarged? Surely not. They understood perfectly the distinction between legislative regulations of commerce, and regulations by treaty, and while they retained the former in their own hands, saw the propriety of leaving the latter to that body which the American na-

tion had appointed to represent it in its transactions with foreign nations; had invested it with the power of "entering into treaties and alliances."

The President and Senate, with respect to treaties, and commercial regulations, now stand on the same ground, which under the old confederation, was occupied by the United States in Congress assembled. The Constitution gives the power of making treaties to the President, under the controul of the Senate: the old confederation gave that power to Congress. Whatever, therefore, the old Congress could do on this subject under the confederation, the President and Senate can do under the constitution. The old Congress could regulate commerce with foreign nations and the Indian tribes, as far as those regulations were to depend on foreign powers, and to be made by treaty. They did it in many instances, attempted it in more, and the people of the United States confirmed their acts. It can of consequence be done by the President and Senate, who have the power, formerly vested in the old Congress, of "entering into treaties and alliances." Under the old confederation the power of regulating commerce internally, by legislative acts, remained with the respective states; under the constitution, it is given to Congress. In both cases it is equally distinct from the treaty making power. Its being expressly given to Congress makes no difference in that respect; for before it was so given it remained in the states, was the same in nature and extent, and could no more controul the treaty-making power in one case than in the other.

Hence it appears clearly to me that the treaty is not contrary to the constitution; not beyond the powers thereby given to the President and Senate.

It has often been asked, what benefit do we derive from the treaty? How does it conduce to our advantage? In the first place it settles our former differences with Great Britain, differences which every day became more and more serious and embarrassing, and settles them in a manner consistent with our rights and our honour. As it was a case of mutual and contrary demands, we have given up something in order to gain the rest, and to avoid the danger of a quarrel; which, in any possible event, must have been attended with very great mischief. And secondly as to our commerce, we have gained important advantages in many parts of it, particularly the East-India and Canada trade, without making any unusual or improper concession; we have placed the whole of it, for a

certain time, on a permanent footing instead of the precarious state in which it formerly was, dependent on the temporary proclamations of the British government ; and we have laid the foundation for a more lasting, and a more extensively beneficial arrangement.

The question is not whether this treaty be as advantageous as we could wish, or had a right to expect ; but whether, such as it is, our interest requires, all circumstances considered, that it should be accepted ? Whether there be reasonable ground to hope for more advantageous terms by further negociation ; and if not, whether these terms, such as they are, be not preferable to an acquiescence under the injuries of which we complain, or an attempt to redress them by measures of compulsion ? I can discern, after the most careful consideration, no reasonable ground to hope for more advantageous terms from negociation ; and I am most decidedly of opinion that between accepting these, and either acquiescing tamely in our wrongs, or attempting to vindicate them by compulsory measures, of any kind, there ought to be no hesitation.

I cannot conclude, fellow citizens, without taking some notice of the means which have been employed to prejudice and inflame the public mind against this measure. — The most unlimited abuse has been heaped on its authors, its advisers, and its supporters. They have been charged with being corrupted by British gold, with being actuated by a violent hatred to France, and a servile attachment to Great-Britain. Its particular provisions have been misrepresented, and the whole instrument, the result of many months consideration, has been stigmatized and condemned after a hasty reading, and very often without any reading at all. One writer \* among various other gross misrepresentations, has been so shameless as to call this treaty, "an alliance with Great-Britain" no less than ten times in a work of 67 pages ; and to fill several of those pages with objections founded wholly on the 12th article which he knew to have been rejected by the Senate, and consequently no part of the treaty. I say "shameless" because the other parts of his book shew that he is by no means so ignorant as not to understand the difference between a treaty of commerce, and an "alliance." Thus also a person in Philadelphia writing to his friend in Charleston, on June 29th, 1795, a few days after the treaty was ratified, says, that in consequence of the

\* *Features of the Treaty.*

treaty "we must either limit exceedingly our West-India trade, or burn the returns which we bring from thence over and above our own consumption, because Britain, Mr. Jay, and the Senate, have prohibited the citizens from re-shipping them." \* This writer, as he had read the treaty, must have known that all the regulations respecting the West-India trade were contained in the twelfth article, which the senate had rejected; and yet he wilfully misrepresents that very article as the express act of the senate. With the same view of misleading and inflaming the public mind, it is constantly repeated that the great body of the people are opposed to the treaty; that it has received the unequivocal disapprobation of the citizens from New-Hampshire to Georgia. Nothing is less true. I have lately seen in the South Carolina State Gazette, of October 27, 1795, a letter from some person in Philadelphia to his friend in Charleston, dated October 10th, in which the writer says, that he had lately made a tour through the eastern states, and found seven eighths of the people disgusted with the administration, and opposed to the treaty and that system of intrigue and wicked policy which contrived it. I can contradict this assertion on my own knowledge. I have spent the whole fall in travelling through those states, and I have no difficulty in declaring that a very great majority of the people in all of them, perhaps I might say seven-eighths, are perfectly well satisfied with the treaty: and that I believe is nearly the case with all the states north of the Potowmac. I mention these among a vast variety of instances, to shew how much passion and misrepresentation have been employed in deciding on a measure which ought to have been judged of with coolness, candor, and good sense.

But, fellow citizens if the treaty were, what I do not think it is, a disadvantageous and unequal one, are there no reasons why we should acquiesce in it? It is an act of our government, a law, agreed on and enacted by the proper majority of those whom we ourselves have appointed to make treaties. Is it right to resist every law which we do not approve, which we believe to be a bad one? When a measure is under deliberation it is the duty, as well as the right of every citizen to express his opinion about it, and to give his reasons. When the reasons have been heard, and the majority have decided, the rest ought to submit: otherwise government never

\* *Charleston City Gazette, July 14, 1795.*

can go on, never can exist. If the government be wrong, alter it ; if its powers be too great, abridge them : but while it remains unaltered it ought to be obeyed : otherwise the laws will cease to rule, and the dominion of force be set up in their stead. On this subject I take great pleasure in citing the opinion of a very respectable senator, who voted against the treaty. The day after it was ratified in the senate, he told me "that he disliked it, and had thought it his duty to vote against it in the senate ; but that it was now done, was so far an act of government, to which every good citizen ought to submit ; and that he wished sincerely that the people of the United States might be satisfied with it." This sentiment does him the highest honour, and is worthy in my opinion, of imitation by every friend to his country.

Such, fellow citizens, are the reasons which have induced me to believe that the treaty in question is "proper and expedient." It is uncertain whether any question will arise upon it this session ; I do not know or believe that there is any intention in any part of the house to oppose it. The ratification has not yet arrived in this country, though we have heard, through the English newspapers, of its having taken place. Whenever it comes before us, I shall give my voice for its going fully into effect ; convinced that it is consistent with the honour and conducive to the interest and happiness of my country ; of that country among whose citizens, and whose sons it is my boast and my pride to be numbered, and to which it is my highest ambition to be useful. But if I cannot be retained in its service without renouncing my independence, without giving up my understanding, on questions of the greatest magnitude, to the guidance of others, without exercising that trust which the people have reposed in me, in a manner which, after the fullest consideration, my own mind condemns, let me return to a private station. I know that the opinions of many of you, on this subject, differ from mine. I have told you the truth without disguise or concealment : I have explained my motives and principles ; and it is for you to judge whether they merit a continuance of your confidence. If you desire a faithful representative, who will employ all his time and talents, whatever they may be, in finding out the best means of promoting your interest and happiness ; who will think and act for himself, and not by the direction of others ; who will go with you at

all hazards, when he thinks you in the right, and have courage enough to differ from you and oppose you when he thinks you in the wrong, I am bold to declare that I deserve your choice. But if you wish for one of a contrary character, one who before he gives a vote in congress will consider, not how far it may conduce to the public good, but what effect it may have on his own popularity; whose object it shall be not to serve his country, but to keep himself in place; who instead of assisting, with whatever abilities he may have, in carrying on the government so as to promote and secure the public happiness, shall content himself with making declatations against all its acts. I am not the man: fix your choice on another. I shall be grieved at losing your confidence, but I shall not repine or complain; I shall carry with me the consciousness of having deserved to retain it. I shall return among you, pursue those occupations to which my life has been devoted, and prepare myself to serve my country with effect, whenever and in whatever manner, it may think proper to call for my services. You will do me the justice to declare that although I wished for your appointment, I did not pursue it by means unbecoming the independence and dignity of the republican character; that I sought your approbation and your suffrages, by services and industry, not by solicitation or flattery; that I waited till I was called for, and might have been called sooner, had I expressed such a wish. Such of you as have seen me in the legislature of our own state, will also bear witness that I attached myself to no party, and that I devoted my whole time to the public business, that while I advocated your rights with a firmness and zeal I trust not unbecoming their importance, I voted differently from your other representatives, when I thought the public good lay on the opposite side. You can attest that while I laboured to change our state government in that part where I thought it hostile to the rights of a great majority of the people, I nevertheless constantly recommended a perfect submission to it, while it should continue to be our government, and dissuaded from any attempt to effect the desired alteration in any other than the constitutional mode: convinced that the business of the people is to make or alter governments, not to direct their administration; and that although it be not only their right but their duty to amend whatever may be wrong in the established system, every principle of social order and public happiness requires that until they think proper to make the alteration, the government, however defective, ought to be obeyed. The same conduct I shall pursue here; the same principles shall still be my guide. If you approve them, your approbation will be a pleasing and precious reward: if you shall disapprove, I shall cheerfully submit to your determination.

*Robert G. Harper.*

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PHILADELPHIA, DEC. 15, 1795.



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